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No. 95-6465

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

RAY A. LEWIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

# BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether a defendant charged with two petty offenses, who was assured by the trial judge that his sentence (even if convicted of both offenses) would not exceed six months' imprisonment, had a constitutional right to a jury trial.



IN THE SUPREME COURT OF THE UNITED STATES

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 6793-6801) is reported at 65 F.3d 252. The opinion of the district court (App., infra, 1-13)[1] is unreported.

## JURISDICTION

The judgment of the court of appeals was entered on September 5, 1995. The petition for a writ of certiorari was filed on October 20, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] The opinion of the district court was not included in petitioner's appendix, and it is therefore attached as an appendix to this brief.

## STATEMENT

Following a bench trial in the United States District Court for the Eastern District of New York, petitioner was convicted on two counts of obstructing the mail, in violation of 18 U.S.C. 1701. He was sentenced to three years' probation, ordered to participate in a drug treatment program, and assessed $10. The court of appeals affirmed.

1. On two consecutive days, petitioner, a postal worker, was observed ripping open several pieces of mail and pocketing the contents, including marked currency. Gov't C.A. Br. 3. He was charged with two counts of obstructing the mail. Pet. App. 6795. The maximum authorized term of imprisonment for each count was six months' imprisonment. 18 U.S.C. 1701.

2. The magistrate judge granted the government's motion for a non-jury trial. Gov't C.A. Br. 3. She reasoned that since she would not "under any circumstances" sentence petitioner to more than six months' imprisonment, petitioner was not entitled to a jury. Ibid.

The district court affirmed petitioner's conviction. App., infra, 1-13. It rejected petitioner's argument that "the possibility of receiving a [cumulative] sentence in excess of six months, in effect, transformed the two petty offenses into a serious offense, guaranteeing him the constitutional right to a jury trial." Id. at 3. In the court's view, the right to a jury trial on a criminal charge is determined by the severity of the sentence for that charge, not by the seriousness of the defendant's



overall conduct, as measured by the potential aggregate penalty on all of the offenses charged. Id. at 4-5.[2]

3. The court of appeals affirmed. The court noted that other federal courts have held that "potential sentences must be aggregated to determine the right to a jury trial," but it "reject[ed] the reasoning of these courts." Pet. App. 6797. It explained that the appropriate focus is not on "the defendant's view as to the seriousness of facing over six months imprisonment for aggregate sentences," but rather on "how seriously Congress views the offenses in the aggregate." Id. at 6798. The court observed that, under 18 U.S.C. 3584(a), absent a contrary court order or statute, "multiple terms of imprisonment imposed at the same time run concurrently," which indicates a congressional presumption "that multiple offenses prosecuted jointly are no more serious in their aggregate than the most serious single offense of conviction." Pet. App. 6798. Moreover, the court saw little merit in viewing petitioner's jointly tried petty offenses in the aggregate, when petitioner's claimed "right to a jury trial could have been obviated altogether had the government chosen to simply charge both counts * * * in separate informations." Ibid.

The court of appeals distinguished Codispoti v. Pennsylvania, 418 U.S. 506 (1974), in which this Court affirmed the right to a

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[2] The district court also rejected petitioner's claim that the magistrate judge's authority, under 18 U.S.C. 3563(b)(6), to order petitioner to give up his job as a postal worker as a condition of probation was an "additional statutory penalty" that rendered his offenses serious and entitled him to a jury trial. App., infra, 10-12. Petitioner did not pursue that argument in the court of appeals.

jury in criminal contempt proceedings that had resulted in multiple consecutive six month sentences. The court of appeals explained that, in Codispoti, the aggregate penalty actually imposed was the only available objective measure of the seriousness of the offense, because Congress has not specified a maximum penalty for the offense of criminal contempt. Pet. App. 6799-6800.

After it concluded that petitioner had no right to a jury trial on his two petty offenses, the court noted the government's suggestion that, even if aggregation of the potential sentences for two offenses had been appropriate, petitioner would still have had no entitlement to a jury, since the magistrate judge had promised petitioner before the trial that he would receive a sentence of no more than six months' imprisonment. Pet. App. 6800. While observing that it "need not resolve this question," the court stated that the government's suggestion lacked merit. Noting that the seriousness of an offense is "measured principally by the maximum punishment authorized by Congress," the court reasoned that a trial judge's "self-imposed limitations on sentencing * * * cannot deprive a defendant of his constitutionally protected right to a jury trial." Id. at 6800-6801.

ARGUMENT

Petitioner correctly observes (Pet. 4-6) that the holding in this case conflicts with the decisions of other courts of appeals, which have viewed the penalties for jointly tried petty offenses in the aggregate for purposes of determining the defendant's right to a jury trial. This case is not an appropriate vehicle for



resolution of that conflict, however, because on the facts of this case it is unclear that petitioner would have been entitled to a jury trial under the law of any Circuit.

1.a. This Court has long held that "there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision." Duncan v. Louisiana, 391 U.S. 145, 159 (1968). In deciding whether a particular offense is petty, the Court has looked to "objective indications of the seriousness with which society regards the offense," Frank v. United States, 395 U.S. 147, 148 (1969), primarily "the severity of the maximum authorized penalty." Baldwin v. New York, 399 U.S. 66, 68 (1970) (plurality opinion). The Court concluded in Baldwin that "no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized." 399 U.S. at 69. In Blanton v. City of North Las Vegas, 489 U.S. 538, 543 (1989), the Court established the converse presumption that "an offense carrying a maximum prison term of six months or less" is "petty" for Sixth Amendment analysis. Ibid.

The Court's focus on "objective indications" suggests that the jury trial right turns on an independent analysis of the seriousness of each charged offense, rather than the aggregate penalty that might be imposed in a single trial. When a defendant is charged with several petty offenses, there is no constitutional or statutory requirement that those offenses be charged in a single information or tried jointly. Petitioner conceded below (Pet. App. 6798-6799) that if the two offenses of which he was convicted had

been prosecuted in separate trials, he would not have been entitled to a jury in either trial, even though the district court would similarly have had the authority to sentence him to two consecutive six-month terms of imprisonment. "The administrative convenience of trying separate offenses on the same day or even on a single charging document does not change the seriousness of the offenses or the risk to the defendant." United States v. Coppins, 953 F.2d 86, 92 (4th Cir. 1991) (Niemeyer, J., dissenting). As Judge Niemeyer further explained,

> [t]he fact remains that the defendant is charged with separate, petty offenses, each constituting a crime for which the defendant would not be entitled to a jury trial. The meaningful constitutional object of inquiry is the offense with which the defendant is charged, not the accumulation of offenses tried on a given day or on a given charging document. Judicial efficiency imposed at no greater risk to the defendant should not change the standard for determining whether the defendant is given a jury trial.

Ibid.

b. Contrary to petitioner's argument (Pet. 7), the court of appeals' focus on the maximum authorized penalty for each individual offense does not conflict with this Court's decision in Baldwin. That case involved a single charge of "jostling" under New York law, Baldwin, 399 U.S. at 67, and the Court had no occasion to address the standards applicable to jointly tried petty offenses.

Nor does the decision below conflict with Codispoti. See Pet. 8-9. In that case, this Court looked to the aggregate penalty actually imposed by the trial court for several criminal contempts in determining whether the offenses charged were serious enough to



entitle the defendant to a jury trial. As the court below recognized, in the criminal contempt context, "no maximum penalty is provided by law," and "the only measure of the seriousness of a particular contemnor's criminal acts is the entirety of the court's sentence -- the aggregate of the penalties imposed for each contemptuous act -- a matter which is strictly at the court's discretion." Ibid. See also Blanton, 489 U.S. at 542 n.6. Where, as here, "Congress has provided a specific measure of the seriousness" of the crime by establishing a maximum penalty, Pet. App. 6800, "[t]he judiciary should not substitute its judgment as to seriousness." Blanton, 489 U.S. at 541.

Criminal contempts also pose unique issues that may militate in favor of access to jury trials. The trial court determines how many contempts will be prosecuted, sets the penalty for each individual act of contempt, and decides whether the penalties will run consecutively. Accordingly, determining the right to a jury trial on the basis of the aggregate penalty imposed serves as a safeguard against vindictive or capricious judicial action. As this Court explained in Codispoti,

> [i]t is normally the trial judge who, in retrospect, determines which and how many acts of contempt the citation will cover. It is also he or, as in the case here, another judge who will impose the sentences and who will determine whether they will run consecutively or concurrently. In the context of post-verdict adjudication of various acts of contempt, it appears to us that there is posed the very likelihood of arbitrary action that the requirement of jury trial was intended to avoid or alleviate.

418 U.S. at 515. There is no similar need for a safeguard where the maximum authorized penalties have been established by the legislature.

2. As petitioner notes (Pet. 5), the other courts of appeals that have addressed the issue have (contrary to the court below) looked to the aggregate incarceration periods for jointly tried petty offenses. See Coppins, 953 F.2d at 90 (right to jury trial depends on maximum potential aggregate sentence); United States v. Bencheck, 926 F.2d 1512, 1518 (10th Cir. 1991) (same) (citing Harr v. Hanrahan, 708 F.2d 1547, 1553) (10th Cir. 1983)); Rife v. Godbehere, 814 F.2d 563, 564 (9th Cir.) (right to jury trial depends on length of term of incarceration actually imposed), amended, 825 F.2d 185 (9th Cir. 1987). This case is not an appropriate vehicle for review of that conflict, however, because, under the facts of this case, it is unclear that petitioner would have had a right to a jury trial under the extant law of any Circuit.

In Bencheck, even though the cumulative authorized maximum penalty exceeded six months' imprisonment, the Tenth Circuit held that no jury trial was required, because the district court had promised the defendant pre-trial that it would not sentence him to more than six months' imprisonment if he were found guilty. Bencheck, 926 F.2d at 1513. Since the magistrate judge in this case similarly promised petitioner that she would not "under any circumstances" impose an aggregate sentence exceeding six months'



imprisonment, petitioner would have had no entitlement to a jury under settled Tenth Circuit law.

Petitioner would have had no greater recourse to a jury in the Ninth Circuit. In Rife, the court of appeals explained that "[w]here the judge has discretion to impose [imprisonment of] more than six months by imposing consecutive sentences, * * * it is the judge's [actual] exercise of his discretion, not the mere fact that he has discretion, that determines whether the offense is 'petty.'" Rife, 814 F.2d at 564-565 (brackets in original) (quoting Maita v. Whitmore, 508 F.2d 143, 146 (9th Cir. 1974), cert. denied, 421 U.S. 947 (1975)). Although the court found that the defendant had initially been denied his constitutional right to a jury trial, it held that the violation had been "remedied" by the trial court's [later] reduction of the sentence to six months' imprisonment." Id. at 565. In this case, the Ninth Circuit would presumably have found no violation (or would have found any such violation "remedied") because petitioner was actually sentenced only to three years' probation.

Finally, while the Fourth Circuit held in Coppins that "the maximum sentences of imprisonment authorized for those petty offenses with which [the defendant] was charged should have been aggregated for purposes of determining her right to [a] jury trial," Coppins, 953 F.2d at 90, it "expressed no opinion" as to whether "a court may, by pretrial formal commitment not to impose a sentence of imprisonment in excess of six months, remove any right to jury trial that otherwise would obtain," id. at 90 n.2.

Since the Fourth Circuit has not yet addressed the effect of a judicially imposed pre-trial sentence limitation, it is unclear whether that Circuit would find a right to a jury trial in this case.

Petitioner argues (Pet. 9) that the court of appeals' statement that "self-imposed limitations on sentencing by the court cannot deprive the defendant of his constitutionally protected right to a jury trial" (Pet. App. 6800-6801) conflicts with the Tenth Circuit's resolution of that issue in Bencheck. Petitioner is not the appropriate party to raise that objection, since the court of appeals sided with petitioner on the issue. Moreover, since the court had already determined that petitioner had no right to a jury trial, its remarks regarding the significance of pre-trial sentencing stipulations were mere dicta, as petitioner concedes (Pet. 9). Those remarks provide no basis for further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DANIEL S. GOODMAN
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DECEMBER 1995

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

Appellee,

DECISION
93-CR-1342 (CBA)

-against-

RAY A. LEWIS,

Defendant-Appellant.

----------x

AMON, U.S. DISTRICT JUDGE

INTRODUCTION

Appellant, Ray Lewis, was convicted on February 25, 1994, after a bench trial before Magistrate Judge Azrack, on two counts of obstructing the mail in violation of 18 U.S.C. § 1701. The appellant challenges his conviction claiming that he was charged with a "serious" offense and was thus constitutionally entitled to a jury trial. For the reasons set forth below, the Court finds that appellant was not entitled to a jury trial and his conviction is hereby affirmed.

BACKGROUND

Appellant was charged in a two-count information with knowingly obstructing the passage of mail in violation of 18 U.S.C. § 1701 on June 3, 1992 and on June 4, 1992. Each count carried a maximum sentence of six months' imprisonment, a fine of one hundred dollars and a ten dollar special assessment.

Over appellant's objection, the government moved that the appellant be tried non-jury. Upon granting the government's motion

for a non-jury trial, the Magistrate Judge stated affirmatively that if defendant was convicted on both counts, under no circumstances would she impose a term of imprisonment greater than six months pursuant to 18 U.S.C. § 3584.[1]

Defendant was subsequently convicted of both counts and was sentenced to three years probation on each count, with the sentences to run concurrently. Defendant appeals his conviction claiming that it was error to deny him the constitutional right to a jury trial.

DISCUSSION

In Baldwin v. New York, the Supreme Court reaffirmed the long-standing principle that the Sixth Amendment mandates that a defendant charged with a "serious" offense is entitled to a trial by jury, while a defendant charged with a "petty" offense may be tried without a jury. Baldwin v. New York, 399 U.S. 66, 68 (1970) (plurality opinion) (citing Duncan v. Louisiana, 391 U.S. 145 (1968)). "In deciding whether an offense is 'petty,' we have sought objective criteria reflecting the seriousness with which society regards the offense ... and we have found the most relevant such criteria in the severity of the maximum authorized penalty." Id. at 68 (citations omitted). The Court held that a potential

[1]18 U.S.C. § 3584 provides in relevant part that "[i]f multiple terms of imprisonment are imposed on a defendant at the same time ... the terms may run concurrently or consecutively ... Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively."



sentence in excess of six months imprisonment is sufficiently severe by itself to render an offense "serious". Id. at 69.

In Blanton v. City of North Las Vegas, Nev., 489 U.S. 538 (1989), the Supreme Court revisited the issue of distinguishing a serious offense from a petty offense for the purpose of determining a defendant's right to a jury trial . After declining to hold that an offense carrying a maximum prison term of six months or less is automatically a "petty" offense, the Court held that such offenses are presumed to be petty for purposes of the Sixth Amendment's right to a jury trial. The Court explained:

> A defendant is entitled to a jury trial in such circumstances only if he can demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a 'serious' one. This standard, albeit somewhat imprecise, should ensure the availability of a jury trial in the rare situation where a legislature packs an offense it deems 'serious' with onerous penalties that nonetheless do not puncture the 6-month incarceration line.

Id. at 543.

The parties do not dispute that the conduct proscribed by 18 U.S.C. § 1701 is a "petty" offense; however, appellant claims that he was entitled to a jury trial because he faced an aggregate possible sentence of 12 months imprisonment if convicted on both counts charged in the information. He argues that the possibility of receiving a sentence in excess of six months, in effect, transformed the two petty offenses into a serious offense, thereby guaranteeing him the constitutional right to a jury trial. In

support of his claim that aggregation of the possible sentences is required when multiple petty offenses are charged in the same instrument, appellant emphasizes the Supreme Court's focus in both Baldwin and Blanton on an objective assessment of the seriousness of an offense as indicated primarily by the maximum authorized penalty.

The Supreme Court has not specifically addressed the issue of whether or not a defendant facing multiple counts that each carry a maximum sentence of six months or less, but which aggregate to a potential sentence in excess of six months imprisonment, is entitled to a jury trial. The language of the decisions in both Baldwin and Blanton, however, leads this Court to conclude that it is inappropriate to aggregate the maximum penalties of multiple petty offenses charged in the same instrument for the purpose of determining a defendant's right to a jury trial. In reaching this conclusion, the Court finds the reasoning of Judge Niemeyer in his dissent in United States v. Coppins, 953 F.2d 86 (4th Cir. 1991), persuasive.

The Supreme Court refers to a defendant's right to a jury trial being determined by the "seriousness of the offense". See Baldwin v. New York, 399 U.S. at 68; Blanton v. City of North Las Vegas, Nev., 489 U.S. at 542. "The meaningful constitutional object of inquiry is the *offense* with which the defendant is charged, not the accumulation of offenses tried on a given day or on a given charging document." Coppins, 953 F.2d at 92 (J. Niemeyer, dissenting). By focusing on the seriousness of the



offense charged, rather than the seriousness of defendant's overall conduct, the logical conclusion is that a defendant is entitled to a jury trial only if he faces a maximum sentence greater than six months for any single offense that is charged.

The maximum authorized penalty for a given offense is the primary objective factor to be considered in evaluating the seriousness of a particular offense. Blanton, 489 U.S. at 541. Recognizing that the legislature is in the best position to determine the severity of an offense, the Supreme Court cautioned that "[t]he judiciary should not substitute its judgment as to seriousness for that of a legislature, which is 'far better equipped to perform the task, and [is] likewise more responsive to changes in attitude and more amenable to the recognition and correction of their misperceptions in this respect.'" Id. at 541-42 (quoting Landry v. Hoepfner, 840 F.2d 1201, 1209 (5th Cir. 1988) (en banc), cert. denied, 489 U.S. 1083 (1989)). Similarly, the judiciary should not alter the legislature's determination of the seriousness of an offense by concluding without foundation that the legislature intended that commission of two petty offenses would equal a serious offense.

Appellant acknowledges that the government could have properly charged him in two separate criminal informations, each setting forth a single count of obstructing the mail in violation of 18 U.S.C. § 1701, and tried him on each count separately in different bench trials. Appellant concedes that he would not have been entitled to a jury trial under these circumstances even though if

convicted at both trials, he could have received consecutive prison terms, which in total exceeded six months.

Proceeding in this fashion is obviously inefficient and provides the defendant with no greater rights or procedural protections. The Court fails to comprehend how the administrative convenience achieved by trying multiple offenses in a single proceeding alters the seriousness of any of the charged offenses. As Judge Niemeyer so aptly observed, "[j]udicial efficiency imposed at no greater risk to the defendant should not change the standard for determining whether the defendant is given a jury trial." Coppins, 953 F.2d at 92 (dissenting).

In a related context, courts have declined to aggregate penalties to determine the jurisdiction of a magistrate judge. Pursuant to Section 3401(a) of Title 18, a United States Magistrate Judge has the authority to try misdemeanor offenses. Setting forth multiple misdemeanors in a charging instrument with the potential that consecutive sentences in excess of a year may be imposed does not transform these offenses into felonies and deprive the magistrate judge of jurisdiction. See United States v. Manjarrez-Arce, 382 F.Supp. 1046 (S.D.Ca.) (defendant charged with three misdemeanor offenses could be tried before a magistrate and upon conviction, sentenced by the magistrate to three consecutive terms of imprisonment of six months each), aff'd, 504 F.2d 426 (9th Cir. 1974), cert. denied, 419 U.S. 1112 (1975). "It is the grade of the offense, which the Congress has only addressed in terms of the length of the maximum term of imprisonment, which is determinative



of the magistrate's statutory jurisdiction." United States v. Raynor, 764 F.Supp. 1067, 1070 (D.Md. 1991) (where defendant was convicted before a magistrate on a misdemeanor offense, under 18 U.S.C. § 3401, the magistrate had jurisdiction to revoke defendant's supervised release even though revocation sentence, when added to the original sentence, may result in a term of imprisonment in excess of a year). Similarly, the charging of multiple petty offenses in one instrument does not transform them into a serious offense for the purpose of determining a defendant's right to a jury trial. The jurisdictional and procedural aspects of a case are determined by the nature of each offense charged, rather than the cumulative effect of all of the offenses charged in the information.

This Court has reviewed the opinions which support the appellant's argument for aggregating the maximum penalties of the charged offenses. In United States v. Coppins, 953 F.2d 86 (4th Cir. 1991), the defendant was charged in a single information with one count of trespassing on a military reservation, one count of assault by beating and one count of simple assault after engaging in a fight with military personnel who denied her entrance to the military post. The majority concluded that even though each of the charged offenses was by itself "petty", the defendant was entitled to a jury trial because she faced an aggregate sentence of fifteen months for all three counts. Similarly, in United States v. Musgrave, 695 F.Supp. 231 (W.D.Va. 1988), defendants charged with seven petty offenses arising out of an alleged continuous

conspiracy to violate the migratory bird and game animal laws were entitled to a jury trial because they faced a possible aggregate sentence for all of the offenses in excess of six months. See also United States v. O'Connor, 660 F.Supp. 955 (N.D.Ga. 1987) (defendant charged with two petty offenses, driving under the influence and reckless driving, is entitled to a jury trial because he faced a potential aggregate penalty of one year imprisonment); United States v. Coleman, 664 F.Supp. 548 (D.D.C. 1985) (defendants charged with two counts for loitering and congregating around the White House were entitled to a jury trial where aggregate maximum penalty was one year in prison). These decisions are not binding on this Court. For the reasons discussed previously, the Court does not believe that these opinions are correctly decided and declines to follow them.

In reaching this result, the Court notes that it does not accept as relevant the distinction the government seeks to draw between the facts of this case and the facts of the cases relied upon by the appellant. The government notes that where courts have aggregated the penalties, the multiple petty offenses arose out of a single criminal incident; whereas, here the appellant is charged with two petty offenses, each arising from a separate criminal act. On this basis, the government maintains that there is no authority to support the aggregation of penalties of multiple petty offenses for the purpose of determining a defendant's right to a jury trial where the offenses stem from multiple criminal incidents.

Inherent in the government's argument is the notion that



multiple petty offenses are somehow more serious when they arise from a single criminal act than when they stem from multiple criminal incidents. The Court finds this distinction to be unconvincing. In fact, if one were to distinguish at all between multiple offenses arising from a single incident and those arising from multiple incidents, it is the latter category that would often be considered more "serious". Separate and repeated incidents of criminal behavior would appear more serious and pose a greater likelihood that the defendant would be sentenced to consecutive terms of imprisonment than charges arising from one criminal episode. It is therefore not logical to distinguish between these two situations for the purpose of deciding whether or not to aggregate the maximum penalties of multiple petty offenses that are charged in the same document.[2]

The Court holds that a defendant charged with multiple offenses is entitled to a jury trial under the Sixth Amendment only if any one of the offenses carries a maximum sentence greater than six months.[3] Multiple petty offenses charged and tried together do not entitle a defendant to a trial by jury even if the defendant faces a potential aggregate sentence in excess of six months.

Appellant further argues that even if the Court determines

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[2]Appellant's argument that the offenses charged in the information actually constituted a single criminal incident or course of conduct, therefore need not be addressed.

[3]Given this holding, the Court does not reach the issue of whether the Magistrate's pre-trial guarantee that if convicted on both counts, defendant would not be sentenced to a term of imprisonment greater than six months, operated to eliminate any claim by the defendant that he is entitled to a jury trial.

that aggregation of the maximum potential sentences for each petty offense is not appropriate, he was entitled to a jury trial because he faced the possibility of an additional statutory penalty that rendered the offense "serious". Pursuant to 18 U.S.C. § 3563(b)(6), the Court had the authority to order appellant to give up his job as a postal worker as a condition of a sentence of probation. Prior to trial, Magistrate Judge Azrack concluded that this potential additional statutory penalty did not render the charged offense "serious".[4] The Court agrees with the Magistrate's conclusion that the additional economic penalty appellant possibly faced is not sufficient to transform the petty offense of 18 U.S.C. § 1701 into a "serious" offense for purposes of determining the jury trial right.

In Blanton, the Supreme Court expanded the consideration of objective indications of the seriousness of an offense to include "any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration". Blanton, 489 U.S. at

[4]In reaching this conclusion, Magistrate Azrack found United States v. Stoklasa, 1992 WL 77550 (S.D.N.Y. 1992) (denying defendant's application for a jury trial finding that 18 U.S.C. § 1701 was a "petty" offense because it provided for a maximum sentence of six months' imprisonment and a $5,000 fine) to be directly on point. The court in Stoklasa rejected defendant's argument that the potential collateral consequences of losing his job as a postal worker transformed the offense from petty to serious stating that such consequences "flow not from any criminal penalty mandated by Congress, but from the policies adopted by the United States Postal Service." Stoklasa, at *2. Although Stoklasa appears to reach the appropriate conclusion, that 18 U.S.C. § 1701 is a "petty" offense for the purpose of determining a defendant's right to a jury trial, the court never considered the implication of 18 U.S.C. § 3563(b)(6) in this determination and therefore cannot be considered controlling.



543. The Court cautioned, however, that it would be the "rare" occasion that the legislature would impose additional statutory penalties that were sufficient to render an otherwise petty offense, serious. Id.

Most recently, the Supreme Court has held that driving under the influence of alcohol in a national park, with a maximum penalty of six months' imprisonment and a fine of $5,000, was a petty offense for the purpose of determining defendant's right to a jury trial even though the defendant faced an alternative sentence of five years probation. United States v. Nachtigal, 113 S.Ct. 1072 (1993). The Court concluded:

> Nor do we believe that the parole alternative renders the DUI offense 'serious.' Like a monetary penalty, the liberty infringement caused by a term of probation is far less intrusive than incarceration. The discretionary probation conditions do not alter this conclusion; while they obviously entail a greater infringement on liberty than probation without attendant conditions, they do not approximate the severe loss of liberty caused by imprisonment for more than six months.

Id. at 1074.[5] The Court's emphasis on the fundamental difference between a sentence of incarceration and a sentence of probation undermines appellant's argument that the potential penalty of losing his job as a condition of probation is sufficient to render the charged offense "serious".

[5]The Court specifically referenced the discretionary conditions that may be imposed pursuant to 18 U.S.C. § 3563(b). Nachtigal, 113 S.Ct. at 1074, fn.*. However, the defendant in Nachtigal was not subject to the particular condition at issue here, § 3563(b)(6).

The only case appellant cites where a court found that the additional statutory penalties rendered the charged petty offense, "serious", is Richter v. Fairbanks, 903 F.2d 1202 (8th Cir. 1990). In that case, the Eighth Circuit found that a mandatory fifteen year license revocation, in addition to a maximum prison term of six months, rendered a third offense DWI "serious", thereby affording defendant the right to a jury trial. The holding in Richter is consistent with the language of Nachtigal and Blanton which indicates that it is statutory penalties that may be imposed in addition to a period of incarceration that potentially afford a defendant the right to a jury trial for an otherwise petty offense. See Nachtigal, 113 S.Ct. at 1073; Blanton, 489 U.S. at 543. Here, the authority of the Court pursuant to § 3563(b)(6) to order the defendant to relinquish his job at the Post Office is only as a condition of probation. There is no authority for the Court to mandate his dismissal together with a term of imprisonment. Accordingly, the potential for job loss does not render the offense serious.

## CONCLUSION

The Magistrate Judge did not err in refusing to grant appellant a jury trial. Where a defendant is charged with multiple petty offenses in a single document, the potential maximum sentences for the offenses should not be aggregated for the purpose of determining whether the individual is entitled to a jury trial. Furthermore, the possibility of appellant being required to



relinquish his job as a postal employee as a condition of a sentence of probation was not sufficient to render the charged offenses "serious". Therefore, appellant was not entitled to a jury trial and his conviction is hereby affirmed.

Dated: Brooklyn, New York
December 7, 1994

Carol Bagley Amon
United States District Judge